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March 31, 2017

**VIA ECF**

The Honorable James Orenstein  
United States District Court  
Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, New York 11201

Re: *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*,  
05-md-1720 (JG)(JO): Renewed Motion for Leave to File Under Seal

Dear Magistrate Judge Orenstein:

The Target Plaintiffs<sup>1</sup> seek leave to file their Memorandum Concerning Relation Back and *American Pipe* Tolling as to Target Plaintiffs' Second Amended Complaint (the "Target Memorandum") and the Joint Exhibit of 7-Eleven, Target and Home Depot Plaintiffs to Memoranda in Support of Relation Back and *American Pipe* (the "Joint Exhibit") under seal.

As the Court has pointed out, in *United States v. Aref*, 533 F.3d 72, 83 (2d Cir. 2008), the Second Circuit held: "Transparency is pivotal to public perception of the judiciary's legitimacy and independence.... Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification." However, "[w]hen litigation requires disclosure of trade secrets, the court may disclose certain materials only to the attorneys involved." *In re N.Y. Times Co.*, 577 F.3d 401, 410 fn. 4 (2d Cir. 2009). In considering whether protection of trade secret information justifies the sealing of a judicial document, this Court has applied the following approach:

In determining whether information warrants protection as a [Rule 26(c)] trade secret, courts have considered the following: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by employees and others involved in the business; (3) the measures taken to guard the information's secrecy; (4) the value of the information to the business or to its

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<sup>1</sup> The "Target Plaintiffs" consist of the following individual plaintiffs: Target Corporation; Macy's Inc.; The TJX Companies, Inc.; Kohl's Corporation; Staples, Inc.; J.C. Penney Company, Inc.; Office Depot Inc.; OfficeMax Incorporated; L Brands, Inc.; Big Lots Stores, Inc.; Abercrombie & Fitch Co.; Ascena Retail Group, Inc.; Saks Incorporated; Lord & Taylor LLC; The Bon-Ton Stores, Inc.; Chico's FAS, Inc.; Luxottica U.S. Holdings Corp.; and American Signature, Inc., together with each of their subsidiaries.



The Honorable James Orenstein  
March 31, 2017  
Page 2

competitors; (5) the amount of time, money, and effort expended in development of the information; and (6) the ease or difficulty [in] duplicating or properly acquiring the information.”

*Nycomed U.S., Inc. v. Glenmark Generics, Inc.*, No. 08-CV-5023 (CBA), 2010 U.S. Dist. LEXIS 20788, 2010 WL 889799, at \*5 (E.D.N.Y. Mar. 8, 2010) (quoting *Chembio Diagnostic Sys., Inc. v. Saliva Diagnostic Sys.*, 236 F.R.D. 129, 136 (E.D.N.Y. 2006)).

We request the Court’s permission to file the Target Memorandum and the Joint Exhibit under seal because both contain references to materials that Visa and MasterCard have marked as highly confidential, thereby indicating, pursuant to the Protective Order, a good faith belief that the materials contain trade secrets. Specifically, the Joint Exhibit contains detailed references to the following information and/or documents that Visa, MasterCard or issuing banks have identified as constituting trade secrets, and that on their face appear to meet the criteria of *Nycomed*:

- Deposition testimony from Paul Allen, Frank Philip Christian, Vincent R. D’Agostino, Etienne Goosse, Noah Hanft, Chris Jorgensen, Billy Knupp, Richard Timothy Morrissey, Carl Munson, William Sheedy, Tim Steel, Tolan Steele, and Robert Towne.
- Expert reports from Benjamin Klein, Kenneth Elzinga, Kevin M. Murphy, Robert H. Topel, Christopher M. James, and Robert Litan.
- Deposition testimony from expert witnesses Gustavo Bamberger, Edward Snyder, Kenneth Elzinga, Kevin Murphy, Benjamin Klein, Christopher James, and Robert H. Topel.

The Joint Exhibit also contains detailed references and excerpts from the expert reports and deposition testimony of class plaintiffs’ economic expert, Alan Frankel, and the deposition testimony of two other experts retained by plaintiffs, Joseph Stiglitz and Christopher A. Vellturo. Again, the designation of these materials as confidential on their face appears to meet the criteria of *Nycomed*.

Likewise, the Target Memorandum contains extensive references to these materials, as well as allegations in its Second Amended Complaint that the Court has previously found to have appropriately been designated confidential.

In sum, the documents for which leave to file under seal is sought contain extensive citation and quotation to reports and transcripts that have been designated “Confidential” or “Highly Confidential” by the producing party, thereby indicating the producing party’s good faith belief that the document is a trade secret. Each, on its face, appears to meet each of the *Nycomed* factors: all concern internal business decisions or admissions that Visa and MasterCard have avoided publicly disclosing.



The Honorable James Orenstein  
March 31, 2017  
Page 3

Accordingly, we respectfully submit that good cause exists for filing the Target Memorandum and the Joint Exhibit under seal because of the stated interest of Defendants in maintaining the confidentiality of the referenced documents and testimony. We further submit that an appropriate balance between the public's interest in disclosure concerning judicial proceedings and the Target Plaintiffs' ability to address the relation back and *American Pipe* issues that the Court requested be addressed is best struck by allowing these materials to be filed under seal.

Respectfully submitted,

/s James A. Wilson

James A. Wilson

Vorys, Sater, Seymour and Pease LLP  
Attorneys for Target Plaintiffs

cc: Counsel of Record (via ECF)

Enclosures:

Ex. A: Memorandum Concerning Relation Back and *American Pipe* Tolling as to Target Plaintiffs' Second Amended Complaint

Ex. B: Joint Exhibit of 7-Eleven, Target and Home Depot Plaintiffs to Memoranda in Support of Relation Back and *American Pipe*